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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1931.

No. 178

WILLIAM J. STRATTON, SECRETARY OF STATE OF THE STATE OF ILLINOIS, APPELLANT,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM STATUTORY DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, SOUTHERN DIVISION.

REPLY BRIEF OF APPELLANT.

I.

The Statute and Nature of the Tax.

The statement of appellee refers to the allegation in its bill that it has paid admission fees on $5,500,000 of its capital stock in Illinois, and has actually used $1,533,324.43 of its issued stock in that State. Appellee has the right to use all of its capital stock on which it has paid admission

fees in Illinois, without the payment of any additional fee, and it certainly seems reasonable to assume that it intends to do so.

Appellee refers to the decision in *O'Gara Coal Co.* v. *Emmerson,* 326 Ill., 18, holding certain provisions of the Illinois Corporation Act of 1919 invalid. The only part held invalid was the provision for computing franchise fees and taxes on authorized capital stock, where a part of such stock was unissued, and the valuation of no par value stock for such purpose at $100 per share, which has since been upheld by this Court in *International Shoe Co.* v. *Shartel,* 279 U. S. 429. The decision of the Illinois Supreme Court did not effect the right of appellee and other foreign corporations to use the amount of authorized capital stock in that State on which admission fees had been paid.

Appellee is in error in stating that appellant endeavors to treat the minimum fee assessed against it as an initial or admission fee. The fee here assessed is not a franchise tax or excise upon the privilege of being admitted to do business in Illinois, but is an annual fee assessed for the privileges granted of carrying on business in the State as a corporation during the next succeeding year after the fee was assessed.

Appellee refers to various sections of the Illinois Corporation Act with respect to initial or admission fees, annual reports and methods of computing other taxes, which have little or no application to the question involved in the

present case. Neither is there any question here as to any claim for a refund of any franchise fee or tax which may have been voluntarily paid. It may be noted, however, that appellee has paid at least the amount of the annual fee assessed in this case for many years, but now raises the objection for the first time that this minimum annual fee should not be assessed against it, as provided by the statute.

It should be noted also that the minimum fee is a charge made in advance for the privilege granted of carrying on business in the State during the next year, and is not computed or dependent upon the extent to which such privilege may be exercised during such year. This minimum fee or charge is made against all corporations alike under the same circumstances, for the privileges granted by the State to such corporations.

In beginning its argument, appellee takes the position that the admission fees paid by it purchased the privilege of doing business in Illinois for a period of eighty-eight years, and that therefore no additional fee can be charged for the privilege of doing a corporate business in that State. This is a confusion of the fee charged for admission into the State with the annual fee or tax assessed for the privilege of doing business in the State. Section 80 of the Act requires a foreign corporation, before transacting any business in the State, to procure a certificate of authority therefor, for which it is required to pay an admission fee in the same amount as that paid by like corporations organized in the State (Appellee's Appendix, p. 39).

Section 101 of the statute also provides that all such fees shall be paid "in addition to the annual franchise fees and taxes hereinafter provided." Section 105 provides for an annual franchise tax to be computed upon the proportion of capital stock used in the State the preceding year. However, if the corporation has not used a substantial part of its capital stock in the State the preceding year, it is required by the last clause of Section 105 to pay at least the minimum fee specified in Section 107. This fee is charged for the privileges granted by the State for the next ensuing year, and applies to all corporations alike, both domestic and foreign, under the same or similar circumstances.

The statement of the question involved in this case on page 12 of appellant's brief, is quoted and then restated in varied form by appellee on page 20 of its argument. The first question restated omits the essential conditions that the prescribed fees do not vary in direct proportion to the issued capital stock, and that a reasonable maximum limit upon the tax is fixed, which is directly applicable and is to the advantage of appellee in this case.

The second question stated by appellee ignores the essential difference in the provision for the payment of a minimum fee for the privileges granted by the State, and the fee imposed or computed upon the substantial exercise of the privilege by the corporation. This question also ignores the fact that the statute applies alike to corporations, either foreign or domestic, having a like amount of

capital stock, within the graduated limits fixed in the amount of stock which they may have and use to such extent as they see fit in the State.

The third question presented by appellee, like the first question, ignores the two essential conditions or restrictions of the statute, which distinguish it from general and unlimited provisions and save its validity, as held by this Court in similar cases. This statute merely requires every corporation proposing to carry on local business in the State to pay at least a limited minimum fee for the privilege granted of using its capital stock in the State the next year, which it may exercise to such extent as it sees fit during the year.

II.

The Fee or Tax Imposed does not Burden Interstate Commerce or Violate the Due Process Clause.

Appellee asserts its faith in the decision of the lower Court, and insists that the case of *Cudahy Packing Company* v. *Hinkle,* 278 U. S., 460, controls this case, but disregards the essential differences between the statute involved in that case and the provisions of the statute in question here.

Appellee correctly states the general theory or basis of the franchise tax provisions of the Illinois statute, as applied to corporations using a substantial proportion of their capital stock in that state. The difficulty with appellee

is that it used such a small proportion of its qualified stock in that state the preceding year that it became subject to the minimum fee provided by the statute for the privileges granted by the state for the next year. This provision does not impose an additional tax, as stated by appellee, but only requires the minimum fee to be paid in such cases.

The case of *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1, referred to by appellees, is not in point here. The statute involved in that case imposed a tax computed upon the entire authorized capital stock of foreign corporations, without any restriction or limitation either in the amount of stock or in the amount of the tax imposed. Similar statutes were involved in the other *Western Union* and (*Pullman* cases, cited, and those cases are therefore) not applicable here.

Appellant is not relying strongly here upon the *Baltic Mining Co.* and *Cheney Bros.* cases, as stated by appellee, for the reason that the tax under the Massachusetts statute there involved was not limited in any way, as applied to corporations having capital stock of less than $10,000,000, but nevertheless, the statute was held valid in those cases.

In the cases of *Kansas City, etc. R. R. Co.* v. *Kansas*, 240 U. S., 27, and *Kansas City M. & B. R. R. Co.* v. *Stiles*, 242 U. S., 111, the tax was properly graded and limited to a reasonable amount for the privileges granted. This Court sustained the validity of the statutes involved in those cases, although the railroad corporation in each case was engaged in interstate commerce and had a large amount

of property and business in each state. No distinction was made as between foreign and domestic corporations in those cases.

The case of *Looney* v. *Crane Co.*, 245 U. S., 178, like the *Western Union* cases, involve a statute which imposed both the renewal of a permit or admission tax and an annual franchise tax upon the entire authorized capital stock, or capital, surplus and undivided profits of a foreign corporation previously admitted and doing business in the state. Neither tax was graduated or limited in any respect whatever, but was applied without any restriction or limit to the entire authorized stock or capital of the corporation. That statute was therefore essentially different from those in prior cases distinguished by the Court, which rested upon particular provisions or limitations which saved their validity, as stated by the Court.

This difference between the two classes of cases was further illustrated in the case of *International Paper Co.* v. *Mass.*, 245 U. S., 135, after the maximum limit in the tax was removed by an amendment to the statute, which changed it to the same class as the *Western Union* and *Crane* cases and rendered it invalid.

The *Ozark Pipe Line* and *Alpha Portland Cement Company* cases do not appear to be at all in point, for the reason that those corporations were not carrying on any local business in the state or authorized to do so, but were only engaged in interstate commerce in the respective states which

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REPLY BRIEF OF APPELLANT.

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The assumption of appellee that it could not use the required amount of stock in the state to produce the tax assessed, on account of the provisions of the Transportation Act or the Illinois Commerce Act, is not supported or justified by the record. Appellee has admittedly used a much larger amount of its stock in the state and no reason is shown why it may not do so again by increasing the amount of its property and local business in the state to such extent as it may see fit, under the privileges granted to it by the state.

Appellee seeks to distinguish *General Railway Signal Co.* v. *Virginia,* 246 U. S., 500, on the ground that the tax there was an admission fee, although it was actually assessed for the privilege of doing business in the state. Such a tax is no different in principle from the tax here assessed for the privilege granted of carrying on business in the state during the next year.

The distinction made by this Court in the *Hanover Insurance Co.* and *Latrobe* cases, cited by appellee has no application here. In the former case there was a discrimination against foreign corporations in assessing an annual franchise tax, while in the latter case the tax was in reality a franchise tax for the privilege of doing business in the state, like the *Signal Co.* case, and was likewise held to be valid.

III.

The Statute as Applied to Appellee does not Discriminate Against it or Violate the Equal Protection Clause.

Appellee asserts that the statute discriminates against it as compared with other corporations which pay franchise taxes measured by the proportion of the capital stock used in the state. The fact is, however, that such corporations pay a higher tax on that basis that they would be required to pay under the minimum fee provisions of the statute, and therefore any possible discrimination would be against them and in favor or appellee.

Appellee also refers to the proportion of issued capital stock which it says has been admitted and used in Illinois, but overlooks the fact that it has paid admission fees on $5,500,000 of its capital stock in that state. Therefore, it clearly had the right to use that amount of stock in the state during the next year, without the payment of any additional fees, even though it used a much less amount in the state the preceding year. Appellee also had the right to qualify and use a greater amount of its capital stock for use in the state, whenever it desired to do so.

Although not denying that the amount of issued stock which may be used bears a "fair relation" to the value of the annual franchise to do business in the state, appellee says that nevertheless the ratio of property owned and business done bears "a more true relation" to the value of the franchise. Appellee therefore concludes that the state discriminates against it because it has exercised its fran-

chise during the last year to a less extent than some other corporations have done, and which would therefore have to pay a higher tax in proportion for such use.

When appellee in effect admits that the franchise tax imposed upon it may bear a fair relation to the value of the privilege granted to it by the state, it concedes that the tax was imposed on a valid basis. It is immaterial that appellee may believe that some other basis for computing a tax bears a more true relation to the value of the privileges granted or exercised. The state is not required to select a method which may be deemed by corporations to be the most reasonable and fair basis for computing taxes imposed upon them. It is only required to select a method which bears some relation to the value of the privileges granted and such a statute is not arbitrary or invalid, as held by this Court in *New York* v. *Latrobe*, 279 U. S., 421, 427.

The contention that the statute is discriminatory because it provides two methods for imposing a franchise tax, merely confuses the minimum fee for the privileges granted with the larger tax which may be imposed upon the substantial exercise of the privilege by corporations. These provisions are applicable respectively under different conditions and apply equally in all cases under like circumstances, without any discrimination for or against any corporation to which such provisions are applicable.

The difficulty with appellee is that it considers this tax essentially as a property tax, or a tax according to the

value of its property and business in the state, and not as an excise or franchise tax on the privilege granted of doing business in the state as a corporation during the next year. For that reason, it insists that the tax should be computed only on the part of its capital actually employed in the state, without any regard to the amount of capital which it may use, or the value of the privilege granted to it by the state. The value of the privilege granted has a direct relation to the amount of its capital which may be used in the state and which may therefore be considered to a reasonable extent in fixing the amount of tax to be paid for such privilege.

It is urged by appellee that the statute discriminates against it because a corporation with a small amount of capital stock, of which all or a much greater proportion is used in the State, would pay a less amount of tax than that assessed against appellee. Such a corporation in fact would pay a larger tax than appellee in proportion to its capital stock which may be used by it in the State, but the payment of such larger tax by it affords no ground for a claim of discrimination against appellee. It has had $5-500,000 of its capital stock qualified for use in the State, and admits that would have to use only $2,000,000 of such stock in the State to produce a tax of $1,000 at the rate specified in Section 105.

The State does not require corporations having a large amount of capital to bring more of their property and business into the State than small corporations, but only re-

quires them to pay a reasonably limited fee or tax for the privilege granted of carrying on local business in the State. The amount of property and business which a corporation may have in the State does not determine the amount of the fee or tax assessed in any case, but only the issued stock which has been used or may be used is considered in determining the value of the privileges granted by the State or exercised by the corporation.

The quotation by appellee from the opinion in the *Airway case* supports the position of appellant here. The court there disclaimed holding that the charge made must be measured by the value of the privilege for which it is imposed, but stated that some relation to such value is a reasonable requirement. It seems clear that such a relation exists between the fee charged and the privilege granted in the present case, and therefore the statute is not arbitrary or unreasonable.

It is also said by appellee that the tax is not limited to the part of the capital stock apportioned to the taxing state, referring to the *International Shoe Company case.* The tax in that case was imposed on the basis of the general provisions of the statute here involved. If the general rate was applied to the proportion of capital stock of appellee admitted and qualified for use in the State, it would produce nearly three times the amount of the minimum fee assessed against appellee. It thus appears that appellee is favored by charging only the minimum fee for the privileges granted to it, rather than assessing a tax at the usual rate upon the proportion of its stock which it proposed to use in the State.

The provisions of the statute here involved apply equally and without discrimination to all corporations alike under the same circumstances. The tax assessed is closely related to the privileges granted by the State and is very reasonable in amount. The statute therefore does not deny the equal protection of the laws to appellee or any other corporation.

For the reasons set forth in appellant's original brief and herein referred to again, it is most respectfully but earnestly urged that the decision of the lower court was erroneous and should be reversed and that the cause should be remanded with directions to set aside the decree granted and dismiss the bill of complaint for want of equity.

Respectfully submitted,

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Counsel for Appellant.

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Assistant Attorney General,
Of Counsel for Appellant.

No. 178

ADDITIONAL POINTS AND AUTHORITIES.

The following points and authorities are to be added to the Supplemental Brief of Appellant on Federal and Equity Jurisdiction, on page 5 after point III (a):

(b). The appellee had a plain, adequate and complete remedy at law, if payment of the tax assessed had been made under protest and under compulsion of threatened penalties and forfeiture of rights, by an action at law against the collecting officer to recover the amount so paid.

Yates v. *Royal Ins. Co.*, 200 Ill., 202;

City of Chicago v. *Mutual Ins. Co.*, 218 Ill., 40, 44.

Highway Comrs. v. *Bloomington*, 253 Ill., 164, 176;

School of Domestic Arts v. *Harding*, 331 Ill., 330;

(c). The Illinois statute indicates the method by which a tax paid involuntarily under protest may be withheld from the State Treasury until a suit to recover such payment has been terminated, by providing as follows:

> "It shall be the duty of every officer, board, commission, commissioner, department, institute, arm or agency brought within the provisions of this Act by section 1 hereof to hold for thirty days all moneys received for or on behalf of the State under protest and on the expiration of such period to de-

posit the same with the State Treasurer, unless the party making such payment shall within such period file a bill in chancery and secure a temporary injunction restraining the making of such deposit, in which case such payment shall be held until the final order or decree of the court."

Smith-Hurd's Ill. Rev. Stats., 1931, Chap. 127, par. 172, Sec. 2a;

Cahill's Ill. Rev. Stats., 1931, Chap. 127b, par. 35, Sec. 2a;

Ward & Co. v. *Stratton,* 342 Ill., 472, 476-8;

Interstate Iron & Steel Co. v. *Stratton,* 340 Ill., 422;

O'Gara Coal Co. v. *Emmerson,* 326 Ill., 18;

Illinois Iron & Bolt Co. v. *Emmerson,* 333 Ill., 351;

Western Cartridge Co. v. *Emmerson,* 335 Ill., 150; 281 U. S., 511.

(d) The statute does not provide a new or exclusive remedy, as a temporary injunction could have been obtained prior to this statute, in order to hold a tax paid under protest and duress in a suit brought to recover the amount paid.

German All. Ins. Co. v. *VanCleave,* 191 Ill., 410;

American Can Co. v. *Emmerson,* 288 Ill., 289;

Armstrong v. *Emmerson,* 300 Ill., 54;

C. & E. I. Ry. Co. v. *Miller,* 309 Ill., 259;

C. & E. I. Ry. Co. v. *Emmerson,* 327 Ill., 574.

(e). The Statute does not dispense with the rule that the tax must be paid under duress or compulsion, in

sought to impose a franchise tax upon them. Consequently, there was no legitimate basis for such a tax, as stated by the Court in the latter case. Appellee has misconceived their application to the present case.

The case of *Airway Electric Appliance Corp.* v. *Day*, 266 U. S., 71, involved the computation of a franchise tax upon a large amount of authorized capital stock, only about one-eighth of which had been issued. It therefore had no application to the present case, in which only a reasonably limited portion of the issued stock has been considered in determining the minimum fee to be paid. The tax here has no relation to unissued stock, but relates only to the issued stock which the corporation is given the privilege of using in this state.

Appellee relies principally upon the case of *Cudahy Packing Co.* v. *Hinkle*, 278 U. S., 460. That case has been discussed and distinguished from the present case on several grounds in appellant's brief, at pp. 25-26, which need not be repeated here. The two statutes proceed generally upon an entirely different theory and a different basis. The Washington statute invariably imposed a tax upon the authorized capital stock, without any regard to the amount issued or actually used in the state. As held in that case, the statute had no legitimate basis, and the tax so imposed was invalid, regardless of the amount.

The primary purpose of the Illinois statute is to measure a tax by the proportion of the capital stock used in the

state. The tax is computed on that basis in all cases in which the substantial proportion of the stock is used in the state. The minimum fee is assessed for the privileges granted by the state only in cases where such privileges may not have been exercised in the preceding year to a sufficient extent to provide a basis for computing a reasonable fee for the privileges granted by the state for the next succeeding year.

The minimum fee is reasonably and fairly graded and is limited to a very reasonable maximum amount. Such limitations and the restricted application of the statute to cases where the general provisions are inadequate clearly distinguish this case from the *Cudahy* case and bring it within the exceptions to the general rule, as stated by the Court in the *Crane Company* case.

There is no distinction in substance between the interstate commerce of appellee and the Cudahy Company, except that a large part of the business of that company in the taxing state was interstate commerce, while in the present case the amount of interstate commerce in the state is not shown or considered in any way. The Cudahy Company was also required to pay an additional admission or entrance fee upon the increase of its authorized capital stock, although not issued. No such fee is involved here, as appellee has previously paid admission fees on a much larger amount of stock than it would be required to use in the state in order to produce a greater tax than the minimum fee assessed in this case.

order that it may be recovered in an action or suit brought for that purpose.

Richardson Lubricating Co. v. *Kinney,* 337 Ill., 122;

Standard Oil Co. v. *Bollinger,* 337 Ill., 353;

Agni Motor Fuel Co. v. *Kinney,* 340 Ill., 17;

Roxana Petroleum Corporation v. *Bollinger,* U. S. C. C. A., No. 4578, October Term, 1931. (Certified copy of opinion herewith.)

It will be noted that in each of the above cases, the Court held that payment of the tax was made voluntarily, and not through fear of any penalty under the Illinois Motor Fuel Tax Act. It may also be observed that the penalties provided by said Act were not necessarily self-executing, as failure to pay the tax did not result in forfeiture of the right to do business or invalidate contracts, or automatically cause penalties to be added, but permitted the taxpayer to protect himself without making payment of the tax.

On the other hand, the provisions of the Illinois Corporation Act for enforcing payment of franchise taxes assessed under that Act, have been considered to be self-executing and sufficient to constitute duress, if payment of the tax imposed was made under protest and in fear of the enforcement of such provisions, and therefore recovery of an illegal tax so paid has been invariably al-

lowed, as shown by the cases above cited under point (c), which were brought for the recovery of such taxes.

Whenever suit has been brought to recover an alleged illegal tax involuntarily paid under protest, pursuant to the statute, the Illinois courts have invariably granted a temporary injunction to restrain the deposit of such payment until the final order or decree is rendered; and in case of appeal from a decree dismissing a suit, such temporary injunction is continued in force pending the determination of the appeal, pursuant to statutory authority, as shown in the cases above cited.

Cahill's Ill. Rev. Stats., 1931, Chap. 69, par. 21.

This statute does not in any way supersede the right of a taxpayer to recover an illegal tax involuntarily paid under protest in an action at law, or confer any jurisdiction in equity upon the Federal Courts, but merely indicates a convenient method of procedure in the State courts for the recovery of the tax paid.

Henrietta Mills v. *Rutherford County*, 281 U. S., 121, 127-8.

Respectfully submitted,

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